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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ALEXIS S., a Person Coming Under
the Juvenile Court Law.

B173945

(Los Angeles County
Super. Ct. No. CK13254)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

RITA F.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Valerie Skeba, Referee. Reversed.

Anna L. Ollinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Larry Cory, Assistant County Counsel and Judith A. Luby, Senior Deputy County Counsel for Plaintiff and Respondent.

Rita F. appeals from an order terminating her parental rights and selecting adoption as the permanent plan for her daughters. She argues the order must be reversed for insufficiency of the evidence because the assessment of adoptability focused solely on adoption by A.J., who, if married, could not adopt because she was unable to satisfy Family Code section 8603 which requires consent by the spouse of a prospective parent. A.J. claimed that she had been divorced many years before, but could not produce a copy of her divorce decree or other documentary evidence of a divorce. We find merit in the appeal and reverse.

FACTUAL AND PROCEDURAL SUMMARY

Minors Alexis (age 4 years) and Rita (age 4 months) were removed from mother's care by the Department of Children and Family Services (DCFS) in January 2002. Mother had tested positive for marijuana when Rita was born in September 2001, and for cocaine and marijuana on January 14, 2002. As a DCFS worker removed the children, mother became hysterical, grabbed a knife, and threatened to use it on herself. She was subdued by police officers and arrested for assault on a police officer and on an outstanding warrant. At that time mother had four older children in permanent plans through dependency proceedings. The dependency court detained the minors and placed them with their paternal aunt, A. J.

At the jurisdictional hearing, the court sustained allegations of the petition under Welfare and Institutions Code section 300, subdivision (b) (based on Rita being born drug positive, mother's drug addiction, mother's threatening behavior with the knife, Alexis' father's drug use, and four of mother's other children ordered into dependency permanent plans) and subdivision (j) (because mother's treatment of her other children placed Alexis and Rita at similar risk of harm).

Following a contested disposition hearing, the dependency court denied mother reunification services under section 361.5, subdivisions (b)(10) and (b)(11). The matter was set for a permanent plan hearing under section 366.26. DCFS recommended

adoption by A. J. A contested hearing was set after mother objected to the permanent plan of adoption.

A section 366.26 report for both minors stated that Alexis had been placed with A. J. for nearly a year during an earlier dependency proceeding. At the time of the October 2002 section 366.26 report, Alexis had been with A. J. since February 2002. She was bonded with her aunt and with her younger sister, Rita. Rita had been placed with A. J. since she was six months old. Although A.J. expressed her desire to adopt the children, she had failed to provide documents necessary to an adoption home study, including a questionnaire, a medical report, Live Scan reports, references, and a divorce certificate.

Both children were found adoptable and adoption was made the permanent plan for each. The section 366.26 hearing was continued to February 2003. In a report prepared for that hearing, the social worker stated that the adoption home study was incomplete because the same documents had not been provided. A. J. failed to appear three times to complete the Live Scan. The physical environment checklist had not yet been completed and one additional interview with A. J. was required. The matter was continued to address notice issues as to the father of one of the minors.

A section 366.26 report was prepared for the May 2003 hearing. The social worker reported that A. J. told her she had completed the medical documentation and adoption questionnaire and would send them to the worker. The worker told A. J. that a home visit would be scheduled once those documents had been received. A. J. told the social worker that she was having difficulty obtaining her divorce decree and gave the worker information necessary to enable the worker to obtain it. The Live Scan had been submitted to the Department of Justice and FBI and results had not yet been received; no child abuse history was found.

A report prepared for the continued section 366.26 hearing in September 2003 stated that the divorce decree had not been obtained, the Live Scan results were not yet in, and results of a TB test had not been provided. For these reasons the adoption home study could not be completed.

The section 366.26 hearing was continued once again to December 15, 2003. The dependency court expressed concern: “[O]ne thing concerns me a great deal, and that is the home study hasn’t been finished, and I don’t have criminal checks on the paternal aunt. The reason I’m concerned about the home study not being finished is because the reason it’s not finished is due to the fact that she has not gotten a divorce. And that could be something that could permanently hold up the adoption.” The matter was continued so that DCFS could consider whether legal guardianship might be a more appropriate permanent plan in light of difficulty in obtaining a copy of A.J.’s divorce decree.

In an interim report for February 2004, DCFS reported the divorce decree remained the only outstanding item preventing completion of the home study. The Superior Court had informed the social worker there was no record of a divorce in the Main Index Department. The report stated: “After relaying this information to [A. J.], she indicated she was uncertain whether the divorce occurred in Los Angeles County, yet claims she previously had a copy of the decree.” A. J. subsequently telephoned the worker to report that she finally had located her ex-husband in Georgia, and that he also recalled that the divorce petition had been filed in Los Angeles County. He recalled having had a copy of the decree; it was unclear whether he still had it. A. J. said she would ask Los Angeles Superior Court to perform another search.

Mother did not appear at the February 2004 hearing, and a continuance was not requested by her counsel. No new information was provided as to the status of A.J.’s divorce. The court found the children were adoptable, terminated parental rights as to each, and ordered adoption as the permanent plan. Mother filed a timely appeal from that order.

DISCUSSION

Mother challenges the sufficiency of the evidence to support the order finding the children adoptable. She argues that A.J.’s failure to produce her divorce decree is a legal

impediment to adoption because, under Family Code section 8603,¹ a spouse must consent to adoption unless the couple is legally separated. Because A.J. failed to produce the divorce decree for over one and one-half years, mother asserts there was a lack of clear and convincing evidence that the children would be adopted *within a reasonable time* as required by section 366.26, subdivision (c)(1). She contends that by terminating parental rights without establishing the ability of the prospective adoptive parent to legally complete the adoption, the court “placed the children in peril of becoming legal orphans.” This was a concern the dependency court had recognized at an earlier hearing when it suggested that DCFS explore legal guardianship as an alternative permanent plan because of the problems in obtaining a copy of A.J.’s divorce decree.

DCFS responds that adoption was still possible because A.J. could either establish a legal separation, rendering Family Code section 8603 inapplicable, or obtain the consent of her former spouse. Based on these alternatives, and A.J.’s continuing commitment to adopting the children, DCFS argues the court could reasonably believe the divorce issue would be resolved and therefore that the children were adoptable.

Adoption is the statutory preference for a permanent plan. (§ 366.26, subd. (b).) “We review the juvenile court’s order to determine whether the record contains substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that [the minors] were likely to be adopted. (§ 366.26, subd. (c)(1); *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154 [94 Cal.Rptr.2d 693].) ‘Clear and convincing’ evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt.” (*In re Asia L.* (2003) 107 Cal.App.4th 498, 509-510, quoting *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205.)

“‘The issue of adoptability . . . focuses on the minor, e.g., whether the minor’s age, physical condition, and emotional state make it difficult to find a person willing to adopt

¹ Family Code section 8603 states: “A married person, not lawfully separated from the person’s spouse, may not adopt a child without the consent of the spouse, provided that the spouse is capable of giving that consent.”

the minor. [Citations.]’ (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649 [28 Cal.Rptr.2d 82].) All that is required is clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time. (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223 [4 Cal.Rptr.2d 101].)” (*In re Zeth S.* (2003) 31 Cal.4th 396, 406.) A prospective adoptive parent’s willingness to adopt generally indicates “the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family.*” (*In re Asia L., supra*, 107 Cal.App.4th at p. 510, quoting *In re Sarah M., supra*, 22 Cal.App.4th at p. 1650.)

Mother relies on an exception to the rule that the focus in determining adoptability is on the children, rather than on the prospective adoptive parent. Her argument is based on language in *In re Sarah M., supra*, 22 Cal.App.4th at 1650 holding that “[w]here the social worker opines that the minor is likely to be adopted based solely on the existence of a prospective adoptive parent who is willing to adopt the minor, *an inquiry may be made into whether there is any legal impediment to adoption by that parent . . .* (Our emphasis.) This excerpt from the opinion in *In re Sarah M.* expressly cites Family Code section 8603 as one of the legal impediments to adoption which may be explored under the circumstances outlined in the opinion. The *Sarah M.* court concluded: “In such cases, the existence of one of these legal impediments to adoption is relevant because the legal impediment would preclude the very basis upon which the social worker formed the opinion that the minor is likely to be adopted.” (*Ibid.*) But where the social worker’s opinion that a child is likely to be adopted is *not* based solely on the foster mother’s desire to adopt, any possible legal impediment to adoption by that foster mother is not relevant to the adoptability of the children. (*Id.* at p. 1651.)

The issue here, therefore, is whether the social worker’s opinion that the children were likely to be adopted was based solely on A.J.’s desire to adopt. The social worker’s initial analysis of the likelihood that Alexis would be adopted focused on A.J.’s relationship with the child and her desire to adopt both Alexis and Rita. There was no discussion of the general adoptability of the child apart from her relationship with A.J. The report for October 2002 also focused entirely on the bond between A.J. and the

children, and A.J.'s desire to adopt them. The February 2003 analysis of the likelihood of adoption contained the same information, relating solely to the probability of adoption by A.J. The report for May 2003 stated that an updated adoption assessment was completed for Alexis in April 2003. The adoption liaison concluded that adoption by A.J. was the permanency plan. The updated assessment stated that Alexis appeared to have a speech delay and is difficult to understand, but did not demonstrate emotional or mental problems.

The permanency planning assessment prepared for September 2003 was more complete. It reported that Alexis' speech had improved with weekly speech therapy, which would continue until she started kindergarten in the fall. Rita had been receiving services for developmental delays and orthopedic problems. She had made great improvement and had "significantly caught up with developmental expectations for her age." The social worker stated: "Alexis presents a friendly and outgoing child. Alexis does not display any mental or emotional problems at this time. [¶] Rita presents as a happy and active toddler. Rita does not display any mental or emotional problems at this time." But the analysis of the likelihood of adoption and proposed permanent plan section of the September 2003 report again focused entirely on the likelihood that A.J. would adopt. The interim review report prepared for February 2004 had no new assessment of the adoptability of the children.

In light of this record, it appears that the assessment of adoptability of the children was based solely on A.J.'s desire to adopt them. But because of the legal impediment to that adoption due to her failure to provide a copy of her divorce decree, there is a lack of substantial evidence that the children will be adopted by her or at all within a reasonable time. It may well be that A.J. will be able to provide a copy of the divorce decree on remand, at a new section 366.26 hearing. In light of our conclusion that the order terminating parental rights must be reversed, we need not address mother's alternative argument that her counsel was ineffective.

DISPOSITION

The order terminating parental rights and choosing adoption as the permanent plan for the children is reversed. The matter is remanded for a new section 366.26 hearing.

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EPSTEIN, P.J.

We concur:

HASTINGS, J.

GRIMES, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.